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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1669

JAMES E. GUSTAFSON, *Petitioner*,

vs.

STATE OF FLORIDA, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Florida

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No. 72-936

UNITED STATES OF AMERICA, *Petitioner*,

vs.

WILLIE ROBINSON, JR., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT IN NO. 71-1669 AND PETITIONER IN NO. 72-936

INTERESTS OF AMICUS CURIAE

The question presented in the instant cases relates to the permissible scope of a search incident to a

lawful arrest of a traffic law violator for an offense which is serious enough to require a police officer to take the arrestee into custody.[1]

We are vitally interested in the cases for several reasons:

First, we seek a result which will permit a full field search[2] for weapons to ensure the safety of police officers in cases wherein a motorist has been arrested for a traffic offense of sufficient seriousness to require that he be taken into custody. We are particularly concerned about this issue inasmuch as our own Supreme Court has recently curtailed the right of a police officer to conduct even a pat-search in such circumstances unless he can articulate specific facts to support a reasonable belief that the motorist is armed. *People v. Superior Court (Simon)*, 7 Cal. 3d 186, 206 n. 13, 101 Cal.Rptr. 837, 852 n. 13 (1972).

Second, these cases which "are set for oral argument in tandem", also afford this Court an opportunity to re-examine and perhaps re-define the scope

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[1]Not at issue here is a traffic *stop* involving routine traffic infractions for which the officer may only issue a citation. Neither is this a case involving a traffic *detention* for a traffic offense of intermediate seriousness for which the officer may either issue a citation or, if the circumstances warrant, take the violator into custody. Rather, the issue here presented relates exclusively to serious violations of the traffic laws where the *full custody arrest* of the offender is mandatory.

[2]A full field search consists of the following: (1) an initial pat-search for weapons, (2) a thorough search of all pockets and containers wherein weaponlike or even equivocal feeling objects are disclosed or might be concealed. Such a search is a lesser intrusion than the full body search or strip search conducted at a jail prior to confinement therein. See Findings of District Judge Jones in Appendix B, p. 82a of the Petition for Writ of Certiorari in No. 72-936.

of the Exclusionary Rule in both state and federal cases. We do not urge that the Exclusionary Rule be totally abandoned until some meaningful alternative can be developed. Rather, we have accepted the invitation of the Chief Justice to "consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced." *Bivens v. Six Unknown Agents,* 403 U.S. 388, 420-423 (Burger, C. J. dissenting).

Specifically, we urge the Court to adopt a balancing test in lieu of the *per se* rule of exclusion to determine whether evidence obtained in violation of the Fourth Amendment should be admitted or suppressed. The following factors are suggested as being relevant in such a balancing process:

(1) The objective nature and scope of the intrusion. *E.g.,* a technical trespass as opposed to a wholesale exploratory invasion.

(2) The subjective state of mind of the searching officer. *E.g.,* an honest mistake in judgment as opposed to a willful, deliberate, bad faith action.

(3) The public interest in conducting the search, including, for example, the relative gravity of the crime under investigation.

ARGUMENT

I

WHEN A MOTORIST IS ARRESTED FOR A TRAFFIC OFFENSE THAT IS SERIOUS ENOUGH TO REQUIRE HIS BEING TAKEN INTO CUSTODY, THE OFFICER SHOULD BE PERMITTED TO CONDUCT A FULL FIELD-SEARCH FOR WEAPONS FOR HIS OWN PROTECTION.

The risks to the personal safety of police officers inherent in traffic offense encounters is well documented and has been judicially recognized. *E.g., Adams v. Williams,* 407 U.S. 143, 148 (1972). "[E]ven a minor traffic citation incident can occasionally erupt into violence." *People v. Superior Court (Kiefer),* 3 Cal.3d 807, 829, 91 Cal.Rptr. 729, 743 (1970). The danger to the police officer is increased when a traffic law violator is to be taken into custody and transported in a police vehicle. "The critical factor . . . is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed." *People v. Superior Court (Simon),* 7 Cal.3d 186, 214, 101 Cal.Rptr. 837, 857 (1972) (Wright, C.J., concurring).

Therefore, we join with the United States and the State of Florida in urging this Court to authorize full-field searches for weapons in those cases involving lawful arrests for serious traffic offenses when the motorist must be taken into custody.

Such a rule would not create too broad an exception to the general rule that searches be justified by articulation of *specific facts.* Although statistics are not available, it seems fair to assume that full custody

arrests for serious traffic offenses constitute only a small fraction of the millions of routine traffic citation encounters. In this limited category of cases, it would not be an intolerable and unreasonable intrusion into the privacy of the vast majority of peacable citizens who travel by automobile, to permit a full-field search for weapons, not on specific facts, but on the *inherent fact* that there is a significant increase in the danger to the officer in such cases. *Ibid.*[3]

Prior to the California Supreme Court decision in *Simon, supra,* several California intermediate appellate courts had upheld the right of an officer to search for weapons when a motorist was being taken into custody for a serious traffic offense or upon an outstanding traffic warrant for failure to respond to a prior citation. See, *People v. Graves,* 263 Cal.App. 2d 719, 734-735, 70 Cal.Rptr. 509 (1968); *People v. Weitzer,* 269 Cal.App.2d 274, 289-294, 75 Cal.Rptr. 318 (1969); *Morel v. Superior Court,* 10 Cal.App.3d 913, 917-918, 89 Cal.Rptr. 297; *also see People v. Rhodes,* 23 Cal.App.3d 257, 261-265, 100 Cal.Rptr. 487 (1972) [cases summarized in concurring opinion].

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[3]It may be observed, however, that the record in No. 72-936 does reveal the articulation of specific facts to support a field search. The arresting officer had knowledge that various small weapons could be concealed on a suspect and recalled that a fellow officer had been recently injured after he failed to uncover a hidden razor blade. See findings of District Judge Jones in Appendix B, p. 81a of the Petition for Certiorari in No. 72-936. In addition, the officer was directed by his department to conduct a field search incident to a custodial arrest. This directive represented the collective judgment of the department regarding the risks inherent in custodial arrests. This collective knowledge may properly be imputed to the arresting officer. *E.g., United States v. Caniesso,* 470 F.2d 1224, 1230 n. 7 (2nd Cir. 1972) and cases there cited.

In the above cases, the balance between the interest of society in protecting its police officers and the interest of society in preventing intrusions into privacy was struck in favor of the protective interest in custodial traffic arrest cases. For example, the court in *Graves* and *Weitzer* approved at least a pat-search, but left open the question of a more thorough examination of the pockets if ambiguous feeling objects were disclosed. However, the *Weitzer* court did observe that "a rule which requires identification of a weapon to a certainty from a pat-search might fall short of protecting the officer from subsequent assault." *People v. Weitzer, supra,* 269 Cal.App.2d at 291, 75 Cal.Rptr. at 329.[4]

In *Morel* and the *Rhodes* concurrence, the courts answered the question left open in *Weitzer* and held a full field search to be reasonable to ensure an officer's safety from assault by a suspect carrying a small weapon which would not necessarily be disclosed by a pat-down. *Morel v. Superior Court, supra; People v. Rhodes, supra.*[5] Interestingly, the New Jersey Supreme Court has unanimously reached the same

[4]The California Supreme Court subsequently indicated that precisely such certainty of identification was required. *People v. Collins,* 1 Cal.3d 658, 662-663, 83 Cal.Rptr. 179 (1970). However, *Collins* did not purport to apply to custodial arrests, but only to investigatory detentions as in *Terry v. Ohio,* 392 U.S. 1 (1968). Neither may *Sibron v. New York,* 392 U.S. 40 (1968), be equated to the instant case. There, the police were looking for narcotics, not weapons, and the search was not incident to arrest.

[5]*Morel* and *Rhodes* also suggest an alternative rationale for upholding pre-custody field searches, namely, the prevention of the disposing of contraband by the arrestee while he is being transported in the police vehicle. *Ibid., and see, People v. Peterson,* 9 Cal.App.3d 627, 630, 88 Cal.Rptr. 597, 598 (1970).

conclusion in an opinion which apparently has heretofore been totally overlooked. *State v. Campbell*, 250 A.2d 1, 5 (N.J. 1967). Without hesitation, it was held that a pat-search which disclosed an ambiguous object justified examination of the object to assure that it did not conceal a weapon. *Id.*

As previously noted, however, the California Supreme Court has recently disapproved the aforementioned line of intermediate appellate cases and curtailed the right to conduct protective searches in traffic arrest cases. Instead, it has prohibited even a pat-search unless the officer can articulate specific facts to support a reasonable belief that the motorist is armed. *People v. Superior Court (Simon)*, 7 Cal.3d 186, 206, 101 Cal.Rptr. 837, 852 (1972).[6]

It is California's position that the majority of the California Supreme Court has incorrectly weighted the balance too heavily against the public interest in ensuring the safety of its police officers. The instant cases afford California an opportunity to persuade the highest tribunal in the country to redraw that balance in favor of police safety, and approve field searches for weapons in custodial arrest cases. As previously indicated, such a ruling would not be an intolerable and unreasonable invasion of the privacy

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[6]In his concurring opinion in *Simon*, Chief Justice Wright interprets the majority decision as not precluding a pat-search when a motorist is taken into custody, as distinguished from merely being given a citation. 7 Cal.3d at 212-214, 101 Cal.Rptr. at 856-857. The majority does not, however, limit its holding to citation encounters. The same rule prohibiting a pat-search is also applied to custodial arrests upon an outstanding traffic warrant for failure to respond to a prior citation. 7 Cal.3d 206 at n. 13. 101 Cal.Rptr. 852 at n. 13.

of the vast majority of peacable citizens who travel by automobile, given the following factors: (1) the limited nature of the intrusion—a field or pocket search for weapons, not a strip search, (2) the limited application of the field search—only to custodial arrests for serious traffic offenses, (3) the increased likelihood of danger to the officer inherent in such custodial encounters and (4) the public interest in protecting its police officers from such danger.

II

THE EXCLUSIONARY RULE SHOULD BE MODIFIED TO REQUIRE APPLICATION OF A BALANCING TEST TO DETERMINE WHETHER EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT SHOULD BE SUPPRESSED OR ADMITTED.

The case against the Exclusionary Rule has been forcefully stated and developed at length in *Bivens v. Six Unknown Agents, supra* (Burger, C. J. concurring) and *Schneckloth v. Bustamonte,* 41 U.S.L.W. 4726, 4735-4743 (1973) (Powell, J. concurring). No purpose would be served by repeating here the many cited arguments and authorities supporting total or partial abandonment of the rule. Rather, we accept the obligation imposed upon those who would criticize existing institutions to present practical, reasonable alternatives thereto. The instant cases, one state and one federal, set to be argued in tandem, offer this Court a timely vehicle to consider proposed modifications of the Exclusionary Rule.

This Court applies a balancing test (governmental interest in searching v. nature and scope of the intrusion) in determining the threshold question of whether evidence has been obtained by means which violate the Fourth Amendment. *Terry v. Ohio,* 392 U.S. 1, 20 (1968). We urge that the Court adopt a similar balancing approach, in lieu of the present *per se* rule of exclusion, to determine the question of whether evidence so obtained should be admitted or suppressed.

With certain limited exceptions, *per se* rules have not been favored by this Court. *(E.g., Chapman v. California,* 386 U.S. 18 (1972); *Milton v. Wainwright,* 407 U.S. 371 (1972).) A *per se* rule of exclusion in search and seizure cases is, we submit, peculiarly inappropriate. As has been repeatedly observed, claims of unlawful search and seizure are distinct from many other constitutional claims, in that the evidence seized has ordinarily not been rendered unreliable by the means of its seizure. Thus, the claim bears absolutely no relation to the defendant's innocence. What must be sought, therefore, is a reconciliation between the contrasting public interests at stake. Chief Justice Weintraub of the New Jersey Supreme Court has aptly summarized these competing interests:

> "The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. . . . The Bill of Rights was not intended to deny that primary mission. This is not to belittle the inestimable rights thus con-

secrated, but rather to say that those rights may not be read to defeat the very reason for government itself.

> "We must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them." *State v. Bisaccia*, 58 N.J. 586, 590, 279 A.2d 675, 677 (1971).

We urge that a balancing test to determine whether exclusion is warranted better serves these competing interests, than does a *per se* rule which in effect imposes capital punishment upon evidence obtained by even the most inadvertent technical violation of the Fourth Amendment. We suggest that the following factors are appropriate to be weighed in such a balancing approach:

(1) The objective nature and scope of the intrusion.

(2) The subjective state of mind of the searching officer.

(3) The public interest in conducting the search, particularly with regard to the gravity of the crime under investigation.

The Exclusionary Rule was created to protect the privacy of the individual from certain specific conduct on the part of police officers. The conduct sought to be controlled in *Mapp* was described as "official lawlessness in flagrant abuse" of the right to privacy, "unconscionable invasions of privacy," and "utter disregard of the enforceable Fourth Amendment," *Mapp v. Ohio*, 367 U.S. 643, 655, 657, 658 (1961). The conduct in *Mapp* was precisely that. Three police officers arrived at Miss Mapp's residence pursuant to information that a person was hiding in the home who was wanted for questioning in connection with a recent bombing. The officers knocked on the door and demanded entrance, but Miss Mapp, after telephoning her attorney, refused to admit them without a search warrant. Three hours and four additional officers later, the officers forcibly opened the door when Miss Mapp did not respond immediately. Although Miss Mapp's attorney arrived, he was not permitted to see or enter the house. When Miss Mapp demanded to see a search warrant, a paper was held up by one of the officers which she grabbed and placed into her bosom. A struggle ensued in which the officers recovered the paper, handcuffed Miss Mapp because she had been belligerent, and twisted her hand, causing her to yell and plead with the officers.

The prohibited action in *Mapp* falls into two categories: *first*, the subjective factor of the officer's state of mind: deliberate, willful, and in bad faith; *second*, the objective factor of the nature and scope of the intrusion: flagrant, exploratory and substan-

tial. Thus, the activity to be deterred by the Exclusionary Rule is that which deliberately or substantially violates Fourth Amendment rights. To deter this conduct the Exclusionary Rule should be applied only in case of deliberate or substantial violation.

It is contrary to the reasons advanced for the Exclusionary Rule to apply it where the violation by the police officer is both a limited intrusion and an inadvertent, honest mistake in judgment. In order for the deterrence theory to have any validity, the police officer must be able to distinguish right from wrong. He must be able to perceive that conduct which he is to avoid. As was stated by Mr. Justice Traynor in delineating the Exclusionary Rule in *People v. Cahan, supra,* 44 Cal.2d at 448, 282 P.2d at 913: "Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a *choice* between securing evidence by legal rather than by illegal means, officers will be impelled to obey the laws themselves since not to do so will jeopardize their objectives." (Emphasis added.) This will be true only where the police officer knows that he has a choice, that is, only where he knows that his proposed activity would be in violation of Fourth Amendment rights.

Application of the Exclusionary Rule must be tempered with the realization that a police officer is not as well equipped as an appellate court justice to deal with legal subtleties. *See Brinegar v. United States,* 338 U.S. 160, 175 (1949). The police officer does not have the same education, training, or experience as

that of an appellate court justice, nor is the police officer in a position to devote as much time to making a legal determination.

As Judge Friendly has suggested, "It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be forced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court." Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 952 (1965).

Application of the Exclusionary Rule ought also to be adjusted according to the public interest in the search which is at stake in any particular case. Principally, we urge that one of the factors to be considered in the balance is the severity of the crime involved. Justice Cardozo's opinion in *People v. Defore* is often cited but there is significant language in the opinion of Justice Finch in the Appellate Division opinion:

> "To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petty larceny in connection with obtaining such evidence seems a handicap rather than a help to the administration of justice." *People v. Defore, supra,* 213 App.Div. 643, 652, 211 N.Y.S. 134, 142 (1925).

A distinguished member of this Court was similarly inclined:

". . . judicial exceptions . . . should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show proable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. *Brinegar v. United States, supra,* 338 U.S. 160, 183 Jackson, J. dissenting).

Also see, People v. Sirhan, 7 Cal.3d 710, 739, 102 Cal. Rptr. 385, 404 (1972); *Dorman v. United States,* 435 F.2d 385, 392 (D.C. Cir. 1970); *People v. Curley,* 12 Cal.App.3d 732, 747, 90 Cal.Rptr. 783, 794 (1970).

The ethical quandary posed by the application of the Exclusionary Rule without regard to the nature of the crime involved is a significant one. "However much we may be revolted by the methods used by the police to obtain the evidence we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result." The Exclusionary Rule assumes "that the policeman's action always involves a greater social evil than the defendant." Barrett, *Exclusion of*

Evidence Obtained by Illegal Searches, 43 Cal.L.Rev. 565, 581 (1955).

In this case, the crime does not involve violence nor is it an offense against the person. We would freely admit that the offense in this case would not be a factor requiring the relaxation of the Exclusionary Rule. Nevertheless, as has been discussed earlier in Argument I, there is in fact a compelling public interest for the search herein: ensuring the protection of police officers from a high risk of physical assault, which, like a serious crime of violence, calls into play the considerations articulated by Judge Finch, Justice Jackson and Professor Barrett.

CONCLUSION

It has never been adequately explained why a case like *Mapp*, which involved extremely flagrant deliberate police misconduct used for the prosecution of the most trivial offense necessarily requires the suppression of evidence seized with probable cause in good faith reliance upon a statutorily authorized warrant used for the prosecution of murder as in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Without that explanation, the rule should never have been extended to its present breadth.

We do not ask now for the overruling of *Mapp;* we ask that the Exclusionary Rule be limited to those cases like *Mapp* which caused the rule to be promulgated. The Exclusionary Rule has assumed a scope

far beyond the justifications offered when it was imposed upon the States. There is no valid rationale for its automatic extension to all classes of cases regardless of the nature of the police conduct and the gravity of the crime. As a minimum measure, the reach of the rule should be reduced to conform with the reasons offered for the rule in *Mapp*.

The People of the State of California as amicus curiae, respectfully urge the affirmance of the judgment below in No. 71-1669, the reversal of the judgment below in No. 72-936, the adoption of the suggested modifications of the rule in *Mapp v. Ohio*.

Dated, June 26, 1973.

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